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No. 88-832

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

MARTIN WARREN
Petitioner,

v.

STATE OF CONNECTICUT
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT APPELLATE COURT

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QUESTIONS PRESENTED

I. WHETHER A "CLEARLY ERRONEOUS" JURY INSTRUCTION - WHICH AUTHORIZED THE JURORS TO DETERMINE THE ADMISSIBILITY OF EXHIBITS THAT HAD ALREADY BEEN ENTERED INTO EVIDENCE - MAY BE HELD TO BE HARMLESS ERROR UNDER CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967), IN THE ABSENCE OF OVERWHELMING EVIDENCE OF GUILT?

II. WHETHER THE APPELLATE COURT CONSTRUED A CONNECTICUT SEXUAL ASSAULT STATUTE IN AN UNFORESEEABLE MANNER, AND RETROACTIVELY APPLIED THAT CONSTRUCTION TO PETITIONER'S CONDUCT, THEREBY VIOLATING THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW?

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CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Fourteenth Amendment to the Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 17.1, Revised Rules of the Supreme Court of the United States

A review on writ of certiorari is not a matter of right, but of sound

judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

OPINION BELOW

The Opinion of the Connecticut Appellate Court is reported at 14 Conn. App. 688, 544 A.2d 209 (1988) and is reproduced in the petitioner's appendix at 1A. The petitioner's motion for reargument was denied by the Appellate Court on July 13, 1988. A copy of that order is reproduced in the petitioner's appendix at 18A. The Connecticut Supreme Court denied a petition for certification on September 20, 1985. State v. Warren, 209 Conn. 805, 548 A.2d 442 (1988). A copy of that order is reproduced in the petitioner's appendix at 19A.

I. STATEMENT OF THE CASE

Following a trial to a jury in the Connecticut Superior Court, the petitioner was found guilty of sexual assault in the first degree and conspiracy to commit sexual assault in the first degree. On June 14, 1988, the Connecticut Appellate Court unanimously affirmed the petitioner's convictions.

In affirming the convictions, the Connecticut Appellate Court determined that an instruction read to the jury in the trial court, which erroneously created a risk that the jury would independently determine the admissibility of physical evidence, was harmless beyond a reasonable doubt in the circumstances of this case. The Appellate Court also concluded that §53a-70(a) of the Connecticut General

Statutes, pertaining to sexual assault in the first degree, properly imposes criminal liability on any person who compels another person by the use of force to engage in sexual intercourse, regardless of with whom the sexual act is performed. A petition for certification to the Connecticut Supreme Court was denied on September 20, 1988.

II. REASONS FOR DENIAL OF THE PETITION

A. The Connecticut Appellate Court Properly Determined That An Error In The Trial Court's Jury Instruction Was Harmless Beyond A Reasonable Doubt In The Particular Circumstances of This Case, And, Therefore, The Petitioner's Claim Is Insubstantial On The Merits

The petitioner initially claims that the Connecticut Appellate Court failed to assess the strength of the state's evidence in determining that the trial court's erroneous jury instruction was

harmless beyond a reasonable doubt. This claim should not be reviewed for two reasons.

First, nothing in the opinion of the Connecticut Appellate Court indicates that the court was actually unconcerned with the strength of the state's evidence. Despite the petitioner's protestation that the Appellate Court "ignored the overwhelming evidence component" of the harmless error test, Petition at 19, the court's opinion indicates that a relative assessment of the evidence was made.

The Appellate Court noted that the defendant produced several witnesses who testified as to what the defendant was wearing on the night in question. State v. Warren, 14 Conn. App. 688, 702, 544 A.2d 209 (1988); Petitioner's Appendix

at 15A. That testimony, according to the defendant, bore on the issue of identity in this case. Nonetheless, the Appellate Court, without discussion or reference to the defendant's evidence, concluded that the jury at least reasonably could have found that the petitioner was the attacker. State v. Warren, supra, 14 Conn. App. at 689-90. Thus, although not specifically characterized as "overwhelming," a determination regarding the overall strength of the state's evidence on the issue of identity is implicit in the Appellate Court's opinion. In this regard, the petition presents a unique, fact-laden claim. The issuance of a writ of certiorari is hardly justified as a means of further assessing the evidence in this case.

Second, the petition simply does not demonstrate that the harmless error test was misapplied by the Appellate Court. The appropriate inquiry under the harmless error test is whether a reviewing court, upon consideration of the record as a whole, can conclude beyond a reasonable doubt that the constitutional error complained of did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The strength of the prosecution's evidence is just one of "a host of factors" that enter into this determination. Delaware v. VanArsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1985).

The Connecticut Appellate Court, after determining that the challenged instruction created a risk that the jury

might exclude certain physical evidence, concluded that the erroneous instruction was harmless because it was not likely that the jury would have actually excluded physical evidence relating to the disputed issue of identity, and because the defendant's physical evidence was merely cumulative to the testimony presented on that issue. State v. Warren, supra, 14 Conn. App. at 702. The Appellate Court's opinion plainly reveals that the potential effect of the erroneous instruction was considered in light of the entire record as required by the decisions of this Court. See Rose v. Clark, 478 U.S. 570, 578, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 344 (1986); Delaware v. VanArsdall, supra.* The

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* The petitioner did not argue in the courts below that the erroneous (continued...)

petitioner's claim is therefore insubstantial on the merits and fails to present any special and important reasons warranting the issuance of a writ of certiorari. See U.S. S.Ct. R. 17.1

B. The Petitioner's Claim That The Court Below Construed A State Statute In An Unforeseeable Manner, In Violation Of His Due Process Rights, Is Insubstantial

The petitioner next claims that the Connecticut Appellate Court construed Connecticut General Statutes §53a-70a, pertaining to sexual assault in the first degree, in an unforeseeable manner

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*(...continued)
instruction was such that it could never be treated as harmless error. The petitioner's attempt to raise that claim at this stage of the proceedings, see Petition at 20, n.13, should not be permitted since the argument was not "pressed or passed upon below." Illinois v. Gates, 462 U.S. 213, 219, 103 S.Ct. 2317, 2321-22 (1983).

and thereby deprived him of due process of law. However, the Appellate Court's interpretation of §53a-70 is clearly supported by the plain language and legislative history of the statute. See State v. Warren, 14 Conn. App. at 690-93. In view of the obvious support for the Appellate Court's interpretation of §53a-70, the petition fails to present any valid due process challenge. Cf. Rewis v. United States, 401 U.S. 808, 812, 91 S.Ct. 1036, 1059, 28 L.Ed.2d 493 (1971)(conviction reversed where "neither statutory language nor legislative history" supported broad ranging interpretation of statute); Bouie v. City of Columbia, 378 U.S. 347, 356, 84 S.Ct. 1697, 1704, 12 L.Ed.2d 894 (1964) (due process violation where state court's interpretation of statute was

"clearly at variance" with statutory language). The petitioner, therefore, presents no issue worthy of review by this Court.

CONCLUSION

For the foregoing reasons, the State of Connecticut respectfully urges this Court to deny the petition.

Respectfully submitted,

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